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THE GERMAN EMPEROR AND THE FEDERAL COUNCIL.

THE object of this paper is to account historically for the manner in which monarchical authority is organized in the German empire, or in other words, to inquire what organ or organs occupy in the empire a position similar to that which in Prussia belongs to the monarch. For this must have been the way in which the framers of the constitution themselves approached the subject. Certain functions and powers they regarded as monarchical, and the question for them was: To what organ shall these powers be entrusted? Their ideas as to the nature and extent of monarchical authority they of course derived from the political organization of the German states in whose service they had been trained. According to German public law the prince is far from being merely the head of the executive department. He is rather the symbol of the unity of the state, and the center and source of all authority. All the acts of the state are regarded as his acts, although some of them have come to require the consent of a legislative assembly. While in other countries legislative authority has passed from the crown to the parliament, in Germany the monarch is still the legislator, at least to the extent that he refuses his sanction to enactments of which he disapproves. What in England has come to be but a form of speech, is still in Germany a reality.

That the state which they were about to organize must have a monarchical head, and that, too, in the sense here indicated, must have seemed to the founders of German unity a self-evident proposition. But how to organize monarchical authority was a question of extreme difficulty. The simplest solution would no doubt have been to place the King of Prussia at the head of the new federal state. How the other princes would have resented such a proposition may be inferred from the events of 1849. Nothing could be more galling to their pride

than the idea of subjection to one of their own number. But in a monarchical state one must be either subject or monarch. Hence, the only alternative was to entrust monarchical authority to the associated governments, and so to indemnify the princes for the diminution of their authority at home by giving them a share in the authority of the confederation. This solution had the advantage of historical continuity. The associated governments in the old Frankfort Diet (*Bundestag*) under the presidency of Austria, suggested the associated governments in the new Federal Council (*Bundesrath*) under the presidency of Prussia. The retention of ancient forms facilitated the transition from the old order to the new. To this transformed Diet, made up, as formerly, of the envoys of the German states, the most weighty monarchical powers were attributed. Under the constitution, as finally established, the *Bundesrath* enacts laws with the consent of the *Reichstag*, just as the King of Prussia enacts laws with the consent of the Prussian *Landtag*. It is a sort of supreme administrative board, having authority, as a rule, to issue administrative ordinances, and being empowered to remedy defects or omissions that occur in the course of administration. It has, moreover, the right, with the consent of the Emperor, to dissolve the *Reichstag*, and also the authority to decree federal execution against a recalcitrant state.

Up to this point, but no further, the framers of the constitution went on the way toward making the Federal Council the monarch of the empire. While bestowing upon it the powers just mentioned, they withheld from it those which bring the state into relation with foreign states and with its own subjects, and which involve the action of administrative departments. Had they carried out logically the idea with which they started, the Federal Council would stand at the head of the federal administration, and would carry this on by means of its committees, which do, indeed, bear a certain resemblance to ministerial departments. But such a form of organization was not likely to commend itself to statesmen with whom it was an axiom that administration, to be strong and

harmonious, must be under a single chief. Centralized administration was to them the necessary principle, and the single chief in the case before them could only be the King of Prussia.

But centralized administration under the King of Prussia does not necessarily mean the King of Prussia standing as a federal organ at the head of a federal administrative system. The governments, in the constitution which they submitted to the *Reichstag*, seem to have intended to entrust to Prussia the management of certain common interests, such as foreign affairs and the postal service, subject, however, to federal legislation and control. Not federal, but Prussian administration was what they had in mind.¹ This relation would have been similar to that contemplated by Bismarck when, after the Danish war, he offered to recognize the Prince of Augustenberg as Duke of Schleswig-Holstein on condition that certain branches of the ducal administration should be handed over to Prussia. In the new federal constitution, as outlined by him, Bismarck's idea seems to have been to bring about unity by means of federal legislation rather than federal administration. It was by means of agreement between the states, to be carried into effect by the states themselves, that some degree of unity had already been brought about. For treaty stipulation, which formed the bond of union in the Customs Union, it was now proposed to substitute federal legislation, and at the same time to apply to other subjects the same method of bringing about unity. Even according to the constitution as finally adopted, many subjects that belong to the legislative competence of the empire are administered by the states. As bearing directly upon the subject under consideration, the fact may be mentioned that most of the German states have made over to the King of Prussia the military administration, which, under the constitution, belongs to them, thereby establishing a relation of the kind contemplated by the governments; for this admin-

¹ Bornak, Die verfassungsrechtliche Stellung des deutschen Kaiserthums, in *Archiv für öffentliches Recht*, VIII, 431. Haenel, Studien zum deutschen Staatsrecht, II, i, 12.

istration is carried on by him as King of Prussia, and not as Emperor.

The phraseology employed is, to say the least, not inconsistent with the view that the constitution, as submitted by the governments, contemplated not federal but Prussian administration, and consequently the partial incorporation of the other states in Prussia. By the presidency (*Präsidium*), to which the powers in question are entrusted, can only be meant the King of Prussia as president of the Federal Council. So far is the designation from denoting an office to be held by the King of Prussia outside of the Federal Council, that it describes his position as a member of that body. To bestow powers, then, upon the presidency, is to bestow them upon the King of Prussia. It does not, of course, follow that the terms describe the capacity in which the powers are to be held and wielded ; but that certainly is a natural interpretation.

That this is the interpretation which the governments placed upon their own draft, is made clear by the discussions in the *Reichstag*. Attention was called to this subject by certain Liberal members of that body, who pointed out that a serious defect of the proposed constitution was its failure to make provision for ministerial responsibility, and who brought forward amendments providing for the responsibility of the chancellor. The rejoinders made by Bismarck to their arguments furnish invaluable aid in divining the purpose of the governments. The responsibility of the administration was, so Bismarck contended, provided for in the draft. But when he proceeded to show wherein this responsibility consisted, it became clear how widely his views differed from those which had found expression in the proposed amendments. The chancellor was to be responsible to the Prussian government, whose envoy he was, and under whose directions he acted.¹ But responsibility under the laws and constitution of Prussia necessarily implies Prussian administration ; for the responsibility of federal officials could evidently not be measured by Prussian law. That Bismarck should have met the demand for federal responsibility by point-

¹ Stenographische Berichte, 393 and 397.

ing to the dependence of the chancellor on the Prussian ministry, cannot seem strange when we remember that in the constitution as adopted the chancellor, in his capacity as Prussian envoy to the Federal Council, is responsible to the Prussian government; and when we consider the difficulty in the way of making the chancellor responsible at the same time, though in different capacities, to two different authorities, Bismarck's reply goes to the heart of the question. How could the chancellor, in deference to the wish of a majority of the *Reichstag*, advocate a measure before that body, and at the same time, acting under instructions from the Prussian government, cast Prussia's vote against the same measure in the Federal Council? This incongruity has not yet been felt, because the responsibility of the chancellor stops far short of what we mean by ministerial responsibility. But the future may yet show the justice of Bismarck's criticism.

A second criticism made by Bismarck upon the proposed amendment leaves small room for doubt in regard to the interpretation placed by the governments upon their draft. He objected to the amendment on the ground that it contemplated the creation of a federal organ outside of the Federal Council.¹ In the latter body, he argued, the several governments would be represented by their envoys, and hence they might, in a sense, regard its authority as their own. Greater concessions than they had already made could not reasonably be expected of them. They would regard it as a diminution of their authority and an encroachment upon their sovereignty if they were required to submit to an authority of which they did not form part and in whose discussions they did not have a voice.

Statements like these are entirely free from ambiguity. The value of the discussion lies in the fact that it brings out clearly the contrast between Prussian administration under Prussian responsibility and federal administration under federal responsibility. In it we see statesmen feeling their way toward

¹ Nothing could be more to the point than Bismarck's utterances. See Sten. Ber., 388.

the solution of a great political problem. Bismarck had not failed to appreciate the necessity of keeping the Prussian administration of common interests in touch with the Federal Council. His idea seems to have been that the chiefs of these administrative departments should be associated with the chancellor as Prussian envoys to that body. They were not, however, to form a ministry with power to outvote their chief, who was to receive his instructions from the Prussian ministry. To place the administration of common interests under the guidance of the president of the Federal Council was as far as Bismarck could go in the direction of federal responsibility without sacrificing the principle of the responsibility of the chancellor to the Prussian government.

A number of amendments, looking toward the creation of a federal administration, had already been rejected when, pending the discussion of Article 18, which subsequently became Article 17, an amendment was adopted by a large majority which wrought a fundamental change in the draft presented by the governments. "The decrees and ordinances of the presidency," so ran the amendment, "shall be made in the name of the Confederation, and shall require for their validity the signature of the Chancellor of the Confederation, who thereby assumes the responsibility." The change, which, apart from the added clause "who thereby assumes the responsibility," seems mainly one of phraseology, transformed the chancellor into a federal minister at the head of a federal administrative system.

This amendment differed in important respects from the earlier attempts to establish a federal executive. The Radicals disliked the monarchical position of the Federal Council, since such a body could not be made responsible; and they wished to deprive it of its executive functions and to reduce it to the position of an upper legislative chamber. The series of amendments proposed by Ausfeld and his associates¹ represent this point of view. The executive authority was to be lodged in the King of Prussia, as *Bundes-Präsidium*, who was to wield it

¹ Sten. Ber., Actenstück, Nr. 23.

not through the chancellor, but through responsible ministers. The chancellor's position as Prussian envoy to the Federal Council seemed to the Left inconsistent with the responsibility which they were seeking to establish. Much nearer to the principle on which the constitution was drawn up were amendments introduced by von Bennigsen and Lasker, both moderate Liberals. The former proposed the appointment by the presidency of departmental chiefs who should share the responsibility of the chancellor. All governmental acts were to be done under the responsibility either of the chancellor or of the head of the department within which they fell.¹ Bismarck, however, protested strongly against colleagues who might out-vote their chief and so bring the King of Prussia, as head of the federal administration, into conflict with the King of Prussia, as President of the Federal Council. The proposition for the appointment of responsible ministers was again defeated; but later in the same session, in connection with another article, that part of von Bennigsen's amendment which decreed the responsibility of the chancellor was adopted without a division. The idea of a federal executive won the day in the form least inconsistent with the constitution submitted by the governments. Despite the establishment of a federal administration, foreign affairs and the navy were managed for a few years by Prussian bureaus, but under the direction of the chancellor.

The origin of the articles bearing on the position of the chancellor accounts for a curious difficulty of interpretation. Article 15 empowers the chancellor to preside over the Federal Council. But according to Article 17 the chancellor is minister of the Emperor, and as such he cannot be even a member of the body over which he is called to preside. It is only as King of Prussia that the Emperor is a member of the Federal Council, and consequently it is only as a Prussian envoy that the chancellor can enter that body and preside over its deliberations. All difficulty disappears when we remember that Article 15 regards the chancellor as Prussian envoy to the

¹ Sten. Ber., Actenstück, Nr. 48.

Federal Council, and that it was as an amendment to the present Article 17 that the change in his position was made.

The division of monarchical power between two organs might be expected to leave each of them feeble and to invite discord between them. Instead, however, of being weak and discordant, the government of the empire is strong and harmonious. The contradiction, however, between theory and fact, is only on the surface. In reality, though not in form, the King of Prussia is monarch of the empire. The resolutions of the Federal Council are in reality his decisions, though in form they are the decisions of the associated governments. Of the fifty-eight votes in the Federal Council, Prussia has seventeen, fourteen sufficing to defeat amendments to the constitution. Its envoy presides over the body and directs its deliberations. In case of a tie its votes count as well to break the tie as to form it, while upon a number of weighty subjects no change can be made in existing legislation unless the vote of Prussia is cast in the affirmative. It would be futile to inquire whether these constitutional provisions would suffice to secure the preponderance of Prussia, were they not supplemented by the prestige of a state which both in area and in population forms two-thirds of the empire, and whose warriors and statesmen were the founders of German unity. Moral influence indeed is not legal authority, but on the other hand Prussia's legal weight is but the necessarily inadequate legal formulation of its moral ascendancy. Whether a particular constitution will work well in a given country must depend on the political habits of the people of which it is but a partial reflection. The imperial chancellor, speaking sometimes in the name of the associated governments and sometimes as minister of the Emperor, but guiding either in the one capacity or in the other both legislation and administration, is the embodiment of the unity which underlies the division of monarchical authority.

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